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May 4, 2005

VIA ELECTRONIC SERVICE AND UPS

Ms. Mary L. Cottrell, Secretary
Massachusetts Department of Telecommunications and Energy
One South Station
Second Floor
Boston, Massachusetts 02110

Re: Request for Comments Regarding Section 271 Tariffing

Dear Ms. Cottrell:

A.R.C. Networks Inc. d/b/a InfoHighway Communications Corporation, Cleartel Telecommunications, Inc. f/k/a Essex Acquisition Corp., DSCI Corp., IDT America Corp., KMC Telecom V, Inc., and XO Communications Services, Inc. (formerly XO Massachusetts, Inc. and Allegiance Telecom of Massachusetts, Inc.) (the "Parties"), through counsel and pursuant to the above-referenced Memorandum of the Department of Telecommunications and Energy (the "Department"), dated April 12, 2005,¹ hereby oppose the offer of Verizon New England Inc. d/b/a Verizon Massachusetts ("Verizon") to provide unbundled access to its network elements, as required by section 271 of the Communications Act of 1934, as amended, 47 U.S.C. § 271 (the "Act"), solely through individually negotiated commercial contracts based on the particular circumstances, needs and requirements" of competitive local exchange carriers ("competitive LECs" or "CLECs") within Massachusetts.² For the reasons set forth below, the Department must affirm the tariffing requirements directed by its Consolidated Order,³ and accordingly, must

¹ Memorandum from Jesse S. Reyes, Hearing Officer, to Service Lists, D.T.E. 03-60, 04-73 and 03-59, Re: Request for Comments re Section 271 Tariffing (Apr. 12, 2005).

² See Letter from Barbara Anne Sousa, Assistant General Counsel, Verizon to Michael Isenberg, Director, Telecommunications Divisions, Department of Telecommunications and Energy (Mar. 31, 2005).

³ *Proceeding by the Department of Telecommunications and Energy on its own Motion to Implement the Requirements of the Federal Communications Commission's Triennial Review Order Regarding Switching for Mass Market Customers* (D.T.E. 03-60); *Investigation by the Department of*

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reject efforts by Verizon to circumvent its unbundling obligations, under section 271 of the Act, through an unregulated, contract-based offering of network elements that Verizon no longer is obligated to provide under section 251 and 252.

The Section 271 Network Elements Offered by Verizon are Common Carrier Services Within the Jurisdiction of the Department

The Consolidated Order directs Verizon to file with the Department replacement tariffs setting forth the rates, terms and conditions applicable to network elements that Verizon is required to offer to competitive LECs, on an unbundled basis, under section 271 of the Act, including local circuit switching, high capacity (DS1, DS3 and dark fiber) loops and high capacity (DS1, DS3 and dark fiber) dedicated interoffice transport.⁴ The section 271 checklist of network elements that Verizon is required to offer includes “common carrier” telecommunications services that must be offered subject to rates, terms and conditions that are just, reasonable and nondiscriminatory, regardless of the form of service offering elected by Verizon to comply with its obligations under section 271 the Act. As such, Verizon’s offering of section 271 network elements, on an unbundled basis, falls squarely within the jurisdiction and control of the Department, under G.L., c. 159, § 12, and is subject to Massachusetts’ statutory requirements for filing of rate schedules by common carriers, under G.L. c. 159, § 19. Moreover, contrary to the positions asserted by Verizon, the decision of Department to exercise its authority to impose tariffing of section 271 network elements offered by Verizon to Massachusetts CLECs, including local circuit switching, high capacity (DS1, DS3 and dark fiber) loops and high capacity (DS1, DS3 and dark fiber) dedicated interoffice transport, is entirely consistent with the Act, the orders of the Federal Communications Commission (“FCC”) and federal case law precedent. Thus, consistent with its Consolidated Order, the Department should impose tariffing requirements to ensure that Verizon’s offering of section 271 network elements fully complies with the “just, reasonable and nondiscriminatory” pricing standard established by the Act⁵ and Massachusetts state law.⁶

Telecommunications and Energy on its own Motion as to the Propriety of the Rates and Charges set forth in the Following Tariff: M.D.T.E. No. 17, Filed with the Department June 23, 2004 to Become Effective July 23, 2004 by Verizon New England, Inc. d/b/a Verizon Massachusetts (D.T.E. 04-73), Consolidated Order Dismissing Triennial Review Order Investigation and Vacating Suspension of Tariff M.D.T.E. No. 17 (Dec. 15, 2004) (“Consolidated Order”) at 56-57, 71-72.

⁴ *Id.*

⁵ 47 U.S.C. §§ 201, 202.

⁶ Massachusetts G.L., c. 159, §§ 14, 17.

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The authority of the Department to oversee the rates, terms and conditions for communications services provided by “common carriers” within the Commonwealth is firmly grounded in Massachusetts state law. Specifically, under Massachusetts G.L. c. 159, § 12, the Department is accorded “general supervision and regulation of, and jurisdiction and control over” services provided by common carriers, including telephone transmission facilities, and “all conveniences, appliances, instrumentalities, or equipment” used in connection with such telephone transmission facilities, “when furnished or rendered for public use within the Commonwealth.” Consistent with its broad statutory authority, the Department also is permitted, under Massachusetts G.L. c. 159, § 19, to order the filing of rate schedules by common carriers, for all services provided within the Commonwealth, including “rates...and all conditions and limitations, rules and regulations and forms of contracts or agreements” applicable to such intrastate services offered on a common carriage basis. Thus, under Massachusetts state law, the Department may impose tariffing requirements for any network elements or services that Verizon provides to competitive LECs within the Commonwealth on a “common carriage” basis.

The network elements that Verizon provides to competitive LECs within Massachusetts, on an unbundled basis, under section 271 of the Act, fall squarely within the classification of communications equipment and telephone transmission facilities subject to Department “supervision and regulation” under Massachusetts G.L. c. 159, § 12. Furthermore, as set forth below, such network elements offered by Verizon, in accordance with its section 271 unbundling obligations, are furnished for “public use within the Commonwealth.”⁷ Specifically, pursuant to its obligation under section 271 of the Act, Verizon must make available to competitive LECs within Massachusetts those network elements used to provide local telecommunications services to consumers within the Commonwealth, subject to rates, terms and conditions that are “just, reasonable and nondiscriminatory.” The specific form of service offering elected by Verizon to comply with its obligations under section 271 the Act – whether pursuant to tariff, negotiated agreement or otherwise – does not alter the “public” character of the services that Verizon provides, nor Verizon’s obligation to provide such services on a “common carriage” basis.

The “just, reasonable and nondiscriminatory” pricing standard applied by the FCC to network elements that the Bell Operating Companies (“BOCs”), including Verizon, no longer are obligated to provide under section 251 of the Act, effectively requires that such network elements be offered by Verizon, in *all* circumstances, on a common carriage basis.⁸ As

⁷ Massachusetts G.L. c. 159, § 12.

⁸ See *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers* (CC Docket No. 01-338); *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996* (CC Docket No. 96-98); *Deployment of Services Offering Advanced Telecommunications Capability* (CC Docket No. 98-147), Report and Order on Remand and Further

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affirmed by FCC, in the *Triennial Review Order*, Verizon is subject to an independent obligation, under section 271 of the Act, to provide to competitive LECs unbundled access to its network elements, including local circuit switching, high capacity (DS1, DS3 and dark fiber) loops and high capacity (DS1, DS3 and dark fiber) dedicated interoffice transport.⁹ Furthermore, the FCC established that the rates imposed by the BOCs, including Verizon, for section 271 checklist network elements that the BOCs are obligated to provide shall be reviewed in accordance with the “just, reasonable and nondiscriminatory rate standard of sections 201 and 202 *that is fundamental to common carrier regulation* that has historically been applied under most federal and state statutes, including (for interstate services) the Communications Act.”¹⁰ (emphasis added) Thus, consistent with the *Triennial Review Order*, Verizon’s unbundling obligations, under section 271 of the Act, are fully satisfied only if Verizon offers unbundled access to its network elements, on a “common carriage” basis, at rates, terms and conditions that are “just, reasonable and nondiscriminatory,” as required by the FCC.

Importantly, the Department already has determined that its authority under Massachusetts to state law to enforce compliance by Verizon with the “just, reasonable and nondiscriminatory” pricing standard established by the FCC, through intrastate tariffs applicable to the section 271 network elements offered by Verizon, is concurrent, and “unlikely to conflict” with any federal mandate.¹¹ In the Consolidated Order, the Department noted that the statutory pricing standard for common carrier services provided within the Commonwealth, under G.L. c. 159, §§ 14 and 17, conforms to that required by the FCC, and accordingly, permits the Department, under its independent state law authority, to enforce compliance by Verizon with its section 271 unbundling obligation.¹² Specifically, the Department concluded:

[W]e would receive the tariff to determine whether the terms are “just and reasonable” as required by Massachusetts law. G.L. c. 159, §§ 14, 17. We determine that a conflict with the FCC’s enforcement regulation of section 271 elements is unlikely, because the FCC has stated that, in determining whether a rate is just and reasonable, under Sections 201 and 202 of the Act, the

Notice of Proposed Rulemaking, FCC 03-36, 18 FCC Rcd 16978 (rel. Aug. 21, 2003) (“*Triennial Review Order*”), *vacated and remanded in part, United States Telecom Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (“*USTA II*”) at ¶ 663.

⁹ See *Triennial Review Order* at ¶ 654.

¹⁰ *Id.* at ¶ 664.

¹¹ Consolidated Order at 71-72.

¹² *Id.*

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FCC would apply the same “just and reasonable standard that state statutes historically have applied to common carriers”¹³

Thus, consistent with Act and the FCC’s orders, the Department may enforce Verizon’s obligation, under section 271 of the Act, to provide access to its network elements, including local circuit switching, high capacity (DS1, DS3 and dark fiber) loops and high capacity (DS1, DS3 and dark fiber) dedicated interoffice transport, under section 271 of the Act, through intrastate tariffing requirements applicable to common carrier services. And if the Department may regulate these services in a manner that is consistent with federal law, then it must regulate them in a manner that is commanded by Massachusetts state law.

The Tariffing Requirements Imposed by the Department Are Not Precluded by Federal Law

The tariffing requirements directed by the Department under the Consolidated Order are not precluded by any FCC or federal court order, and do not otherwise conflict with the authority of the FCC to enforce BOC compliance with section 271 of the Act. Notwithstanding the specific inquiries of Department Staff, Verizon offers no legal basis for its claim that the FCC is accorded exclusive jurisdiction, under the Act, to interpret and enforce section 271 unbundling obligations. Specifically, Verizon notably fails to address inquiries related to purported limitations on the authority of the Department to enforce BOC unbundling obligations, arising under section 271, through mandatory tariffing of the rates, terms and conditions offered to competitive LECs for checklist network elements, including: (1) whether the FCC has held that a negotiated agreement is the exclusive means by which Verizon can provision [section 271] services to carriers; and (2) whether the FCC has held that states may not require section 271 elements to be tariffed pursuant to state common carriage tariffing statutes. Accordingly, the Department must reject Verizon’s efforts to curtail its authority, under Massachusetts state law, to supervise Verizon’s compliance with section 271 unbundling requirements through the mandatory filing of tariffs for intrastate common carrier services.¹⁴

Verizon’s statement to the Department that “the FCC expressed a clear preference for commercially negotiated agreements” including the rates, terms and conditions for section 271 network elements offered to competitive LECs is inflated at best.¹⁵ The FCC did not

¹³ *Id.* As such, the Department’s tariffing requirements applicable to section 271 network elements “fills the gap,” and is not preempted by federal law. See Consolidated Order at 23.

¹⁴ See Letter from Barbara Anne Sousa, Assistant General Counsel, Verizon to Michael Isenberg, Director, Telecommunications Divisions, Department of Telecommunications and Energy (Mar. 31, 2005) at 4-6.

¹⁵ *Id.* at 4.

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conclude, in the *Triennial Review Order* or elsewhere, that the BOCs' section 271 unbundling obligations *must* be satisfied exclusively through commercially negotiated contracts for the provision of checklist network elements that the BOCs, including Verizon, are obligated to provide. To the contrary, the FCC's statements in the *Triennial Review Order* addressing commercial contracts for network elements provided under section 271 of the Act are decidedly neutral.¹⁶ Indeed, as set forth below, the *Triennial Review Order* accords the BOCs substantial flexibility in demonstrating compliance with the "just, reasonable and nondiscriminatory" pricing standard applicable to the section 271 network elements that the BOCs are obligated provide:

[F]or a given purchasing carrier, a BOC might satisfy this standard by demonstrating that the rate for a section 271 network element is at or below the rate at which the BOC offers comparable functions to similarly situated purchasing carriers under its interstate access tariff, to the extent such analogues exist. Alternatively, a BOC might demonstrate that the rate at which it offers a section 271 network element is reasonable by showing that it has entered into arms-length agreements with other, similarly situated purchasing carriers to provide the element at that rate."¹⁷

In the *Triennial Review Order*, the FCC cited the contract-based approach advocated by Verizon as merely one of several possible means by which the BOCs may offer to competitive LECs section 271 network elements, on unbundled basis, subject to rates, terms and conditions that "just reasonable and nondiscriminatory." Thus, Verizon cannot credibly assert that its offering of section 271 network elements, through negotiated commercial contracts, forecloses state tariffing of the same. Moreover, the fact that a service is offered at rates, terms and conditions that are negotiated does not by itself remove the contract from the tariffing requirement.

The court decisions cited by Verizon similarly fail to establish limitations imposed on the Department, under federal law, that would preclude application of tariffing requirements, under Massachusetts state law, to ensure that Verizon provides to competitive LECs unbundled access to its network elements, subject to rates, terms and conditions that are just, reasonable and nondiscriminatory, consistent with its obligations under section 271 of the

¹⁶ The statements cited by Verizon come from a press release of the FCC and are not connected with any FCC order. These statements, moreover, are consistent with a requirement that any negotiated agreements, once they are reached, should be memorialized in generally available offerings, such as tariffs.

¹⁷ *Triennial Review Order* at ¶ 664.

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Act. Specifically, those decisions define the scope of state commission authority to enforce section 271 of the Act only in the context of initial BOC requests for authority to enter markets for long distance services, and do not address efforts by state commissions to enforce BOCs ongoing compliance with its section 271 commitments. For example, in *SBC Communications, Inc. v. FCC*, 138 F.3d 410 (D.C. Cir. 1998), the D.C. Circuit, on review of a determination by the FCC that SBC's initial application for long distance authority within Oklahoma did not comply with the section 271 checklist, held that the FCC is charged with "deciding the merits of the BOCs' requests for interLATA authorization," and did not address the authority of the Oklahoma Commerce Commission to enforce SBC's ongoing compliance with its section 271 unbundling obligations.¹⁸

The Seventh Circuit, in *Indiana Bell Tel. Co. v. Indiana Util. Regulatory Comm'n*, 359 F.3d 493 (7th Cir. 2004), also addressed the scope of state commission authority, under section 271 of the Act, only in the context of BOCs' initial application for authority to provide long distance services. Moreover, the state commission-imposed "performance assurance plan" rejected by the court, in *Indiana Bell*, differs substantially from the tariffing requirements for section 271 network elements imposed on Verizon by the Department. Specifically, in *Indiana Bell*, the court found compelling that the Indiana Utility Regulatory Commission's order establishing a "performance assurance plan," did not incorporate Indiana Bell's substantive proposals regarding the terms and conditions of its own section 271 compliance, and accordingly, imposed "unnegotiated obligations" on Indiana Bell's provision of local exchange service.¹⁹ However, in stark contrast, the tariffing requirements for section 271 network elements directed by the Department permit Verizon to negotiate rates, terms and conditions for network elements offered to competitive LECs within Massachusetts, but subject to Department review and approval for purposes of compliance with current law and the "just, reasonable and non discriminatory" pricing established by the FCC for such offerings.

The holdings of the federal courts in *Wisconsin Bell, Inc. v. Bie*, 340, F.3d 441 (7th Cir. 2003) and *Verizon North, Inc. v. Strand*, 309 F.3d 935 (6th Cir. 2003) also do not apply in the present context. Specifically, those holdings discreetly limit the authority of state commissions to require tariffing of rates, terms and conditions for network elements provided by the incumbent LECs under section 251(c)(3) of the Act, and do not address state commission regulations, such as those imposed by the Department, applicable to section 271 network elements that Verizon no longer is obligated to provide at TELRIC rates. The distinction is important. The incumbent LECs cannot be required to tariff unbundled network elements offered under Sections 251 and 252 of the Act because they are required to offer those elements

¹⁸ *SBC Communications Inc.*, 138 F.3d at 416-17.

¹⁹ *Indiana Bell Tel. Co.*, 309 F.3d at 497.

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pursuant to the comprehensive regulatory scheme established in the act for negotiating and arbitration interconnection agreements. Elements offered pursuant to section 271 must be tariffed precisely because they are not regulated under the section 251 standards and the section 252 procedures. Indeed, the Sixth Circuit, in *Strand*, explicitly addressed the critical distinction between section 251 and section 271 unbundling obligations that command a different result in the present context. Specifically, the Sixth Circuit found that BOCs' section 271 may be demonstrated by negotiated agreements *or* by generally applicable tariffs.

[H]owever, § 271 of the [Act] permits [BOCs] to enter the long distance market if they can demonstrate that they have opened their local exchanges to competition. The Bell companies demonstrate that they have done so in one of two ways. They can enter into a qualifying interconnection agreement, or, in the event that no market competitors request such an agreement, they can file a qualifying statement of the terms and conditions that the company generally offers... with the relevant state commission. (internal quotations omitted)²⁰

Contrary to the position asserted by Verizon, the *Stand* court makes clear that neither the Act, nor the orders of the FCC, preclude, in any way, a general offering of rates, terms and conditions for network elements provided under section 271, made available to requesting carriers under the supervision of the state commissions. Accordingly, consistent with *Stand*, the tariffing requirements imposed by the Department, applicable to network elements offered by Verizon under section 271 of the Act, fully comport with current federal law.

Verizon Has Not Demonstrated to the Department that its Contract-Based Offering of Checklist Network Elements Will Comply With Section 271 of Act

Verizon has not demonstrated to the Department that its contract-based rates, terms and conditions applicable to the checklist network elements that it must provide comply with the substantive requirements of section 271 of Act, including the "just, reasonable and nondiscriminatory pricing" standard for such network elements established by the FCC.²¹ Indeed, Verizon declines, without explanation, to provide facts essential to a determination by

²⁰ *Stand*, 309 F.3d at 942.

²¹ See Letter from Barbara Anne Sousa, Assistant General Counsel, Verizon to Michael Isenberg, Director, Telecommunications Divisions, Department of Telecommunications and Energy (Mar. 31, 2005) at 7-8.

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the Department that Verizon is, and will remain, fully compliant with its unbundling obligations, under section 271 of the Act, with respect to local circuit switching, high capacity (DS1, DS3 and high capacity) loops and high capacity (DS1, DS3 and dark fiber) dedicated interoffice transport that Verizon no longer is obligated to provide at TELRIC rates.

Most fundamentally, Verizon has offered no evidence that has or will engage in meaningful negotiations regarding the rates, terms and conditions it proposes for its section 271 services. If Verizon has a proposal, and it offers that proposal to all customers on a take it or leave it basis, then Verizon's conduct disproves the assumption that the offering is just and reasonable because it is a "commercial" agreement. Contracts of adhesion are not commercial agreements, and by definition, are not just and reasonable.

Verizon also offers the Department no assurance that it will refrain from discriminatory behavior in its commercial negotiations with individual competitive LECs for rates, terms and conditions applicable to the section 271 network elements that it must provide, or even that it will engage in good faith negotiations with similarly situated carriers requesting Verizon's contract-based offerings. Specifically, in response to Staff's inquiries, Verizon provides no overview of its contract-based offering of section 271 network elements to competitive LECs, and no meaningful information with regard to the following questions raised by the Department's request:²²

- (1) Will Verizon engage in carrier-to-carrier marketing or other communications to potential carriers? If so, please describe the nature and content of such marketing.;
- (2) What classes of carriers, if any, who, based on their particular needs and circumstances, are similarly situated and would be offered similar rates, terms and conditions for any Section 271 element?
- (3) Will Verizon refuse to deal with certain carriers?
- (4) Does Verizon intend to establish any mandatory rates, terms and conditions for any section 271 network elements that must be included in its final negotiated agreements?

²² See *id.*

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(4) Are all rates, terms and conditions for Section 271 network elements subject to negotiation?

At bottom, Verizon's March 31, 2005 letter to the Department is a mere illustration of its deliberate and pronounced efforts to evade lawful state commission enforcement of its unbundling obligations, under section 271 of the Act, applicable to network elements that Verizon no longer is obligated to provide under section 251.

* * * * *

For the reasons set forth herein, the Department must affirm the tariffing requirements directed by its Consolidated Order, and accordingly, must reject efforts by Verizon to circumvent its unbundling obligations, under section 271 of the Act, through its unregulated, contract-based offering of network elements that Verizon no longer is obligated to provide under section 251.

Respectfully submitted,



Brett Heather Freedson

cc: Service List, D.T.E. 03-60 (via email)